Supreme Court of the United States.

OCEANIC STEAM NAVIGATION COMPANY, Limited, Plaintiff in Error, *against* NEVADA N. STRANAHAN, Defendant in Error. No. 1.	No. 509. October Term, 1908.
INTERNATIONAL MERCANTILE MARINE COMPANY, Plaintiff in Error, *against* NEVADA N. STRANAHAN, Defendant in Error. Nos. 1 & 3.	Nos. 510, 511. October Term, 1908.

Reply Brief.

Counsel for the plaintiff in error ask the Court to receive this reply brief for the following reasons:

First.—The importance of the constitutional questions involved.

Second.—The attitude of the Government toward those questions was not fully known until the Government brief was filed; and

Third.—The prominence given in the Government's brief to arguments based on testimony offered by the defendant in error on the trial in support of a claim which has been overruled by the findings.

This brief will be served on the Attorney General before argument of the case.

Facts.

At the trial, the defendant introduced over the plaintiff's objection testimony relating to the method by which immigrants were examined at Ellis Island and to the effect that, on the examination, such of them as were found to require medical treatment were sent to the hospital, and that notice was given to the steamship companies stating that such aliens had been sent to the hospital and stating the nature of the disease, or stating that the aliens were sent "for observation." (Record No. 509, pp. 45-47; Record No. 510, pp. 58, 59; Record No. 511, pp. 43-45).

No evidence was offered to show what proportion of the aliens so sent to the hospital for treatment or observation were afterwards discharged and allowed to land, but the Government did show that during the period before the trial in which the Immigration Act of 1903 had been in effect 9,354 aliens had been debarred on account of loathsome and dangerous contagious diseases, but that in only 1,125 cases, or about one-eighth of the

whole number, was any fine imposed under Sec. 9. (Action No. 509, pp. 56 and 57; Action No. 510, pp. 69, 70; Action No. 511, pp. 54 and 55).

The Government claimed, at the trial, and now claims, that these notices that the aliens had been sent to the hospital operated as actual, if not technical, notice that some Government official was considering the subject of an imposition of a fine, although the Government's testimony shows that fines were imposed only in the case of a very small percentage of those who were sent to the hospital.

The Government also introduced testimony that each of the plaintiffs had on Ellis Island an employee known as a "landing agent" who might have discovered that a fine might be imposed. But it appears that the landing agent was a subordinate employee charged with the duty of seeing that immigrants were properly forwarded to their destinations. There was no evidence offered to show that these agents were, in fact, notified of the intention of any officer of the Government to impose a fine under Sec. 9, and the Trial Judge so found. (Action No. 509, p. 30; Action No. 510, p. 42; Action No. 511, p. 29).

It is sufficient to say, in answer to all this testimony, that the defendant's claim of actual notice to the plaintiffs, *failed*.

In the cases before Circular 58, the Trial Judge found that the receipt by the plaintiffs of the letter stating that the fine *had been imposed* was "the first notice the plaintiff received that the "imposition of a fine under Sec. 9 of the Im-"migration Act of 1903 was contemplated . . ." (Plaintiffs' Findings, No. 7 and 20, Action No. 509, pp. 26 and 28; Plaintiffs' Findings, No. 7 and

20, Action No. 510, p. 34). And, that there might be no question on this subject, the Trial Judge further found that in imposing the fine the Secretary of Commerce and Labor "acted without no-"tice to the plaintiff and without any opportunity "to the plaintiff to be heard"; and further, that the fine was imposed by the Secretary "without "any hearing or proceeding whatever of which the "plaintiff had notice or at which the plaintiff had "an opportunity to be heard or to produce evi-"dence" (Plaintiffs' Findings 8, 12, 21 and 25, Action No. 509, at pp. 26, 27 and 29; Plaintiffs' Findings 8 and 12, Action No. 510, p. 34).

These findings refer to "notice" and do not qualify in any way the sort of notice to which they refer and it is submitted that they are conclusive on this subject of notice, whether that be regarded as formal notice or any other sort of notice, and that, in so far as the learned Attorney General, on pages 3 to 5, and again on pages 52, 53 and 54 of the Government brief, inadvertently claims to the contrary, such a claim is answered by the findings. The findings quoted on pp. 6, 7, 54, 55 of the Government brief are not in conflict.

In discussing the method by which these fines were imposed after Circular 58, the Attorney General (at pp. 9, 61 and 62) would appear not to have fully recognized the extent to which this subject is disposed of by the findings.

So far as concerns the question whether the plaintiffs in error were given any opportunity to be *heard* after Circular 58, it will be seen that the circular does not purport to give any such opportunity (Plaintiffs' Finding No. 18, Action No. 510, pp. 36, 37, 38; Plaintiffs' Finding No. 5, Action No. 511, pp. 22, 23 and 24), and the Attorney General

claims that Circular 58 had the force of law (see p. 69, Government Brief).

So far as concerns the question whether the plaintiffs were given a reasonable time within which even "to *submit evidence,*" as allowed by Circular 58, the Court found that the period of fourteen days did not afford "a reasonable oppor-"tunity to obtain evidence from the port of em-"barkation and to be heard upon the question "whether a fine should be imposed in the case of "said alien" (Plaintiffs' Finding No. 29, Action No. 510, p. 41; Plaintiffs' Finding No. 15, Action No. 511, p. 27).

POINT I OF GOVERNMENT BRIEF.

As to power of Congress with respect to immigration.

No question is presented in these cases as to the general power of Congress to legislate on the subject of immigration. But because Congress has the power under Sec. 8 of Article I of the Constitution to legislate with respect to a subject it does not follow that it has power to make any provision it sees fit with respect to the punishment of citizens who violate statutes which are passed in a general exercise of such a power.

When an alien comes to our shores and applies for admission to this country, he is asking a privilege. Being an alien, he has no *right* under the Constitution to enter the United States, and even

if a treaty should give him a right to come here, that treaty right may be modified or taken away by any immigration law made subsequent to the treaty.

Congress may, for any reason however arbitrary, exclude him, and, as it is not dealing with constitutional rights in inquiring whether he should be admitted or excluded, it may provide, as it sees fit, for his detention or examination or deportation, and for the ascertainment of the facts on which his admission would depend, and may delegate to executive officers its power to ascertain these facts and act upon them so far as relates to his application to enter the country.

But if, even in dealing with the immigrant himself, Congress seeks to deprive him of his liberty or property, it then enters an entirely different field; that is, it is then seeking to deal with *rights* which the Constitution guarantees to citizens and to the subjects of friendly powers and in this field of constitutional rights Congress is restrained by the Constitution.

This was the essential basis of the decision in *Wong Wing* v. *U. S.*, 163 U. S., 228.

In dealing with the Chinese, Congress had found it necessary not only to provide for their deportation, but also, by an Act of 1892, to provide that any Chinese person adjudged not to be lawfully entitled to remain here should be imprisoned for not less than a year and thereafter deported. Thus far Congress was acting within its powers, and if it had entrusted this punishment of the Chinese to the usual legal machinery of the Government no question could have arisen. But, in attempting to punish a Chinaman, (that is, in depriving him of his liberty or property), it

was dealing with rights which the Constitution guaranteed to him as the subject of a friendly power, and when it provided, as it did, that this punishment could be imposed without a judicial trial it violated those constitutional rights. And this Court, accordingly, held that, while Congress had full jurisdiction over the matter of admitting or excluding aliens, "when Congress sees fit to "further promote such a policy by subjecting the "persons of such aliens to infamous punishment "at hard labor, or by confiscating their property, "we think such legislation, to be valid, must pro- "vide for a judicial trial to establish the guilt of "the accused."

It is true that in the *Wong Wing* case this Court was considering a case of imprisonment and not of the taking of property, but the guarantees which the Constitution gives extend to the taking of property as well as to the taking of liberty, and it is, therefore, proper to conclude that this Court meant what it said when it said in the *Wong Wing* case that when Congress subjects persons either to infamous punishment *or to confiscation of property* there must be a judicial trial.

The powers which Congress has conferred on executive officers, with respect to the admission or exclusion of aliens, or the determination of their status as bearing on the question of admission, have all been powers *which Congress itself could have directly exercised,* and which it could, therefore, delegate to executive officers. But, as Congress itself has no power to punish it may provide for punishment only by passing laws which must be committed to the legal machinery

of the Government for enforcement (*Kilbourn v. Thompson*, 103 U. S., 168). And, as Congress did not have that power to punish it could not delegate to an executive officer a power which it did not possess.

Thus, in *Weyman v. Southard*, 10 Wheaton, 1, 43, Chief Justice Marshall, delivering the unanimous judgment of the Court said:

> "But Congress may certainly delegate to others powers which the legislature may rightly exercise itself."

Again, in *Union Bridge Co. v. U. S.*, 204 U. S., 364, this Court had under consideration the provisions of a River and Harbor Bill by which Congress had empowered the Secretary of War to ascertain the fact whether a certain bridge was an obstruction to navigation. The Court based its decision on the principle that Congress itself had the power to determine the fact, and, therefore, could delegate that power. Mr. Justice Harlan, writing for the Court said (p. 386)—

> "Beyond question, if it had so elected, Congress, in some effective mode and without previous investigation through executive officers, could have determined for itself, primarily, the fact whether the bridge here in question was an unreasonable obstruction to navigation, and, if it was found to be of that character, could by direct legislation have required the defendant to make such alterations of its bridge as were requisite for the protection of navigation and commerce over the waterway in question.'

It will be seen that the basis of these decisions was that Congress itself had power to perform the

act which it empowered the executive official to perform. But, as was held in *Kilbourn* v. *Thompson*, above referred to, Congress has not itself the power to punish a citizen, and yet it is this power to punish the citizen which it has sought to confer upon the Secretary of Commerce and Labor by Sec. 9.

POINT II OF GOVERNMENT BRIEF.

To the effect that Section 9 does not create an offense within the meaning of the word "crime" as used in the constitutional provisions requiring a jury trial.

The plaintiffs in error have based their claim to a judicial trial on the following constitutional provisions:

(*a*) They claim that, if the property of a citizen is to be taken as a punishment for the violation of a general statute, the judiciary article of the constitution and the due process of law clause of the Fifth Amendment require that it be taken by judicial process.

(*b*) They claim that any proceeding to collect a fine under Sec. 9 is a criminal prosecution within the meaning of the Judiciary Article of the Constitution and the Sixth Amendment and, therefore, that a jury is necessary.

In the Second Point of the Government Brief the Attorney General claims that the punishment imposed for violation of Sec. 9 is a penalty and that "into such penalties the punitive element "admittedly enters, but it has more the character "of punitive damages in tort than of criminal pun-"ishment."

There are many cases which discuss the meaning of the words "fine" and "penalty", but it has proved difficult for courts to state any general definition which would serve to distinguish the one from the other, although it has uniformly been recognized that a fine is more severe and punitive than a penalty and accordingly implies more of a criminal element in the offense.

The best light that could well be thrown on this subject is the phraseology adopted by Congress itself in passing Sec. 9, and it will be noted that *Congress there calls the punishment a "fine."*

And there is nothing in the context to transform this "fine" into a "penalty." As, for instance, there is no provision that it be recovered by action, the usual method of recovering a "penalty." Therefore Congress should be held to have used the word "fine" in its proper and technical sense, and it is recoverable by indictment or criminal information and not by action.

While there are statutes providing as to certain classes of fines that they may be recovered by action there is no such statute covering this particular fine or the class to which it belongs. Ever since the passage of the Judiciary Act of 1789, penalties have been recoverable by action.

In considering the meaning of the word "crime" as used in the Third Article of the Constitution, attention has been called by this Court

(*Schick v. U. S.*, 195 U. S., 65, 70) to the fact that in the draft reported to the Constitutional Convention by the Committee of Five this provision read "the trial of all *criminal offenses* shall be by jury" but, by vote of the convention, this was amended so as to read "the trial of all *crimes.*" Of this change Mr. Justice Brewer said, "The "significance of this change cannot be misunder- "stood. If the language had remained 'criminal " 'offenses,' it might have been contended that it "meant all offenses of a criminal nature, petty "as well as serious, but when the change was "made from 'criminal offenses' to 'crimes', and "made in the light of the popular understanding "of the meaning of the word 'crimes', as stated "by Blackstone, it is obvious that the intent was "to exclude from the constitutional requirement "of a jury the trial of petty criminal offenses."

The plaintiffs in error are here claiming the right to a public trial by jury which the Sixth Amendment gives in "all criminal prosecutions" and it is claimed that the phrase "*all* criminal prosecutions" used in the Sixth Amendment is so sweeping a designation of proceedings of a punitive nature as to include the imposition of a fine under Section 9 of the Immigration Act, reserving, of course, the power of Congress, when justified by the legal history of such provisions, to dispense with trial by jury—but not with a judge—where a mere minor penalty is imposed for a petty offense—which is not this case.

The Fifth Amendment starts with the clause requiring presentment or indictment in the case of capital or otherwise infamous crime. In then passing to other subjects and to criminal cases

of less gravity, it provides that a citizen shall not be required to be a witness against himself "in any criminal case." Continuing the same general subject the Sixth Amendment goes on to provide that in "all criminal prosecutions" the accused shall enjoy the right of a jury trial, shall be informed of the accusation, shall be confronted by witnesses," etc. As pointed out in the principal brief of the plaintiffs in error, it has already been held that the words "criminal cases" as used in the Fifth Amendment apply to punishments of the same nature as those imposed under Section 9 and there is no reason why the words "*all* criminal prosecutions" which occur in the following amendment should be limited so as to apply to only the graver degrees of crime or to less than all criminal cases.

In the statement of the guarantees to the citizen in this portion of the Federal Bill of Rights the graver forms of crime had already been dealt with under the head of "capital "and otherwise infamous crime" at the beginning of the Fifth Amendment, and it is apparent that in the latter part of the Fifth Amendment and in the Sixth Amendment the broad general class of punitive proceedings are referred to as distinguished from capital and infamous crimes.

A "criminal prosecution" is a criminal case in action. That is, it is a criminal case after it has been determined that the case ought to go on.

Where there is reason to believe that a law has been violated, there must first be inquiry and investigation to determine whether or not the matter warrants attention. This is a "criminal case." It is not yet a prosecution because it has not yet been determined whether there is to be

any prosecution and it is at this preliminary stage of the matter where it is a "case" and not a "prosecution," and while information is being obtained, that the constitution extends this protection to the citizen, and provides that he shall not be compelled to testify against himself.

If, on investigation, it appears that the case ought to go on, then the "criminal case" becomes a "criminal prosecution" and it is at this stage that the citizen is given a right to a jury trial.

The plaintiffs in error claim that the words "*all* criminal prosecutions" in the Sixth Amendment refer to the same class of cases as those designated "criminal cases" in the Fifth Amendment, and that under *Boyd v. U. S.* (116 U. S. 616) and *Lees v. U. S.* (150 U. S. 476) the plaintiffs in error are entitled to a jury trial if accused of a violation of Section 9 of the Immigration Act.

As bearing on the technical meaning of the words "criminal prosecutions" the plaintiffs in error refer to the decisions in the following States where those words have been directly construed by said courts:

KENTUCKY.

In *Ely v. Thompson*, 10 K'y, 70 (3 A. K. Marshall), the Court of Appeals construed, a clause of the Constitution of Kentucky which provided "that in all *criminal prosecutions*, the accused "hath a right to be heard by himself and coun- "sel," etc.

The Court held (p. 74):

> "It is evident that this section contemplates more kinds of public or criminal pros-

> ecutions, than those which are carried on by indictment or information. * * * Determining what is the meaning of and included in, the words *'criminal prosecutions'* in this section measurably controls the whole section. They evidently mean, any prosecution carried on in the name of the commonwealth for any offense or crime against society. The word *'criminal'* is used as opposed to civil suits or actions. The one includes all suits of the government the end and design of which is the punishment of the accused; the other embraces all actions for individual redress."

MASSACHUSETTS.

In a complaint under the Statute of 1869, c. 45, §44, alleging that certain liquors were kept by the claimant in violation of law and praying for a forfeiture thereof, it was held that the proceeding was of a criminal nature and that the allegations of the complaint must be proved beyond a reasonable doubt.

Mr. Justice Horace Gray writing the opinion said (p. 144):

> "It is upon the ground that these proceedings are in the nature of a criminal prosecution, that they have been held by this court not to be within the statute making the commonwealth liable to costs 'in civil actions and proceedings.'"

Commonwealth v. *Intoxicating Liquors,* 115 Mass., 142.

To same effect is the similar case of *Commonwealth* v. *Intoxicating Liquors,* 122 Mass., 8, 11, and in that case the ruling was applied to a stat-

ute relating to the proofs "in all *criminal prosecutions.*"

KANSAS.

In a proceeding to punish the defendant for contempt in failing to pay alimony it was claimed that the defendant had no right of appeal because the case did not come under the criminal code which gave that right.

It was held:

> "Proceedings for contempt are in the nature of criminal prosecutions,"

and that there was a right of appeal.

State v. *Dent*, 23 Kan., 416, 418.

In support of his argument, the Attorney General refers to *Schick* v. *United States*, 195 U. S., 65. In that case, the Court was considering a section of the Oleomargarine Act, which provided

> "that every person who knowingly purchases or receives for sale any oleomargarine which has not been branded or stamped according to law shall be liable to a penalty of fifty dollars for each such offense."

Congress had designated this punishment as a "penalty," and the Court held that it was a minor penalty, and that, *both parties having waived a jury*, the provisions of Article III of the Constitution providing that the trial of all crimes shall be by jury did not render the proceedings void. The Court did not hold that the defendant would not have been entitled to a jury had he demanded one, still less did it hold that there was no need of judicial process.

If a "penalty" is sued for in an action, as it commonly is, such an action is a common law action within the meaning of the Seventh Amendment, and, by the express terms of that amendment, the accused could not be deprived of his jury trial, although he might waive it.

The Court did, however, discuss, in *Schick* v. *United States,* the question of the relative gravity of offenses, and said, p. 68:

> "The truth is, the nature of the offense and the amount of punishment prescribed, rather than its place in the statutes, determine whether it is to be classed among serious or petty offenses,—whether among crimes or misdemeanors."

And, as throwing light on what the Court would consider a petty offense, the Court said of the offense against the Oleomargarine Act:

> "It is not one necessarily involving any moral delinquency. The violation may have been the result of ignorance or thoughtlessness, and must be classed with such illegal acts as acting as an auctioneer or peddler without a license, or making a deed without affixing the proper stamp."

Applying the tests thus suggested to the subject treated by Section 9 of the Immigration Act, it will be seen that a violation of that section is a serious offense, that it does involve moral delinquency, and that it could not have been committed as the result of mere ignorance or thoughtlessness, unless of criminal ignorance or criminal thoughtlessness.

If a competent medical examination would have detected the existence of a loathsome or danger-

ous contagious disease, then it was a grave moral delinquency for a ship owner to accept, as a passenger, an alien afflicted with such a disease to a degree that inspection at that time would have disclosed it. The reception on a passenger ship of a person so afflicted endangers the health, and possibly the lives of fellow passengers. In fact, there are few situations where contagious diseases are more dangerous than in the crowded quarters of a passenger ship. For a shipowner, who undertakes the obligation of a common carrier to a large number of his fellow creatures, to expose them to such a danger, if a competent medical examination would have avoided the danger, involves at least a moral delinquency in the discharge of that obligation, and it may expose the people of this country to danger, for if seeds of disease are brought on to a ship it may be impossible to prevent those seeds from being taken ashore by some of the passengers.

Considering, then, the amount of the fine prescribed by Section 9, it must be remembered that this fine of $100 may be imposed for every alien who is improperly received as a passenger. This means that if the surgeon of the ship is incompetent, or pursues a wrong method of inspection, a large number of these fines may be imposed at the conclusion of a single voyage. This also means, that if the surgeon is inattentive, or if any neglect occurs, while the immigrants are filing aboard a passenger ship a large sum in fines may be the result.

The real substance of the offense under Section 9 is the failure to provide for a competent medical examination at the port of embarkation and when it is borne in mind that the modern passenger ship

often brings from one to two thousand immigrants, it will be seen that the failure to provide for this examination at a single embarkation may result in many fines, so that the aggregate fine for a single neglect on the part of the ship owner may be a very heavy one.

But considering only the amount of a single fine,—$100, it is significant to note that when the United States District Court was created by the Judiciary Act, its criminal jurisdiction was limited to crimes and offenses

> "where no other punishment than whipping, not exceeding thirty stripes, a fine not exceeding one hundred dollars, or a term of imprisonment not exceeding six months, is to be inflicted."

It is apparent from the connection in which a fine of this amount was referred to that it was not regarded as an insignificant punishment of a petty offense. And if the fine exceeded $100 the Circuit Court was given exclusive jurisdiction.

In the case of *United States* v. *Nash* (111 Fed. Rep., 525), Judge Evans considered the subject of fines and penalties, and also considered the application of the sixth amendment to statutes giving to surveyors of customs the power to collect certain penalties. The case did not necessarily require a decision on the question whether or not the sixth amendment applied, but Judge Evans, after stating that he had been pressed to express his views on the subject, quoted in full the sixth amendment, and said, p. 527:

> "This being so, I should be greatly predisposed to hold that those provisions

of the legislation referred to, if fairly susceptible of the construction contended for, would be unauthorized—First, because they did not, in conformity to that constitutional principle, in any way provide for a trial by jury of the issue of the guilt or innocence of the person accused; and, second, because it is an attempt to bestow judicial powers upon merely executive officers, and to make them at once judges, jurors, and executioners."

POINT III OF GOVERNMENT BRIEF.

To the effect that in committing the enforcement of Section 9 to an executive officer, Congress did not violate the provision of the Constitution relating to the judicial power.

In defense of the Government's position, the Attorney-General under this point, refers to certain instances in which Congress has conferred jurisdiction on executive officers, and at the close of the discussion sums it up thus (p. 51):

> "This overwhelming and uninterrupted line of authorities affirming the plenary power of Congress to adopt whatever means it shall reasonably determine to be efficacious for the accomplishment of its objects conclusively disposes of this case."

It is submitted that a study of the instances thus referred to will not sustain this conclusion.

Congress unquestionably has power to confer on executive officers the power to take summary

action involving property rights in certain cases, but it does not follow from this that Congress may confer that power on executive officers with respect to all the subjects of Federal jurisdiction, for, if such a result did follow, then Congress might give any powers to executive officers with respect to those subjects and this would nullify the constitutional restrictions on the power of Congress.

Each of the instances where Congress may confer this power of summary action on executive officers rests on a special basis, and where such a basis cannot be found Congress has not such a power.

The instances referred to group themselves under several heads.

I.

Cases where it has been recognized from an early period in the development of our institutions that summary action was necessary, and where, on the basis of that necessity, a practice of using summary process had grown up at the time the Constitution was framed.

Under this head comes the power to collect the Government revenue in the form of taxes and customs.

The necessity for summary action here was as well recognized in 1787 as it is to-day. Thus Hamilton wrote in the Federalist (No. LXXXIII), speaking of the collection of taxes:

> "As to the mode of collection in this State, under our own Constitution, the trial by jury is in most cases out of use. The taxes

> are usually levied by the more summary proceeding of distress and sale, as in cases of rent. And it is acknowledged on all hands, that this is essential to the efficacy of the revenue laws. The dilatory course of a trial at law to recover the taxes imposed on individuals, would neither suit the exigencies of the public nor promote the convenience of the citizens. It would often occasion an accummulation of costs, more burdensome than the original sum of the tax to be levied."

Under the same head comes the police power which, in certain instances, may be exercised summarily. Thus, if police officials find a quantity of tainted food in a market, or find cattle infected with a contagious disease, or find a person who is violently insane, or so diseased as to be a menace to his neighbors, the safety of the public does not permit of the delay of judicial procedure, and it is of the essence of the public protection that that protection be given immediately.

The necessity for dealing with these subjects by summary methods was as well recognized when the Constitution was framed as it is now, and the practice of dealing with the subject by such methods was as well established then as it is now. Where courts in discussing such cases have referred to imperative necessity, they have referred to a necessity which was recognized and acted upon at that time and which must have been well known to the men who framed the Constitution. It therefore does no violence to the provisions of the Constitution to hold that it does not apply to such cases, for, in so holding, the Court is only following that general rule of construction which authorizes those who construe a written instru-

ment to put themselves, so far as possible, in the position of those who framed it.

By referring to "imperative necessity", the courts cannot have meant that if the Constitution is found inconvenient it may be disregarded. The Constitution itself would answer an argument to that effect, for if great public inconvenience results from a provision of the Constitution, the method of dealing with that inconvenience is by amending the Constitution and not by disregarding it. Thus, in *Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 18 How, 272, Judge Curtis said on this subject (at p. 276):

> "It is manifest that it was not left to the legislative power to enact any process which might be devised. The article is a restraint on the legislative as well as on the executive and judicial powers of the government, and cannot be so construed as to leave congress free to make any process 'due process of law,' by its mere will. To what principles, then, are we to resort to ascertain whether this process, enacted by congress, is due process? To this the answer must be twofold. We must examine the constitution itself, to see whether this process be in conflict with any of its provisions. If not found to be so, we must look to those settled usages and modes of proceeding existing in the common and statute law of England, before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country."

It cannot be that Congress has the power to avoid complying with the Constitution by merely saying that it thinks there is sufficient necessity

for so disregarding the Constitution. If Congress had such a power, then the constitutional limitations on Congress would amount to little or nothing, for by merely deciding that a necessity exists, Congress could nullify the constitutional limitation on its powers. Congress has full power to determine what is necessary *so long as it acts within constitutional limitations,* and within those limitations it has full power to determine as to the necessity of a certain provision.

This is well shown in the case of *Wong Wing* v. *U. S.* (*supra*). There it was quite within the power of Congress to determine that it was necessary to imprison Chinamen for violations of law, but it was not within its power to overstep constitutional limitations which gave to citizens and to the subjects of friendly powers the constitutional right not to have their liberty or property taken from them as a punishment, except as the result of a judicial trial.

In discussing this subject, Mr. Chief Justice Marshall in *McCulloch* v. *Maryland,* 4 Wheat., 316, 421, said:

> "Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the Constitution, are constitutional."

And again, at page 423:

> "Should Congress in the execution of its powers, adopt measures which are prohibited by the Constitution; or should Congress under the pretext of executing its powers, pass laws for the accomplishment of objects not entrusted to the Government; it would be-

come the painful duty of this tribunal should a case requiring such a decision come before it, to say that such was not the law of the land. But where the law is not prohibited, and is really calculated to effect any of the objects entrusted to the Government, to undertake here to inquire into the degree of its necessity, would be to pass the line which circumscribes the judicial department, and to tread on legislative ground. This Court disclaims all pretension to such a power."

II.

Another class of cases where power to take summary action may be given to an executive officer is in cases where Congress itself has been given full power to deal with a subject or with a branch of a subject, and where it delegates to an officer powers which it could directly exercise.

Under this head come powers with respect to patent rights, Indians and public lands, powers with respect to the creation of national banks, and the terms on which the holders of stock of those banks must hold the stock subject to the orders of certain treasury officials.

Under this head also comes the power to determine what aliens shall be entitled to enter the country and how the facts bearing on the question of their admission shall be ascertained.

The admission and exclusion of certain articles from the mails also comes in part under this head, and in part under the police power. (*In re Rapier*, 143 U. S., 110, 134.)

III.

Another class of cases is where persons have entered into special relations with the Government under the terms of statutes which have given to Government officials power to take summary action.

Thus, contractors for the carriage of the mails have made their contracts with the Government under the terms of statutes which give to the Postmaster General power to reduce their compensation, or impose penalties upon them, in case they fail to fulfill their obligations.

In the same way, soldiers and sailors and the employees of various departments, may suffer a reduction or confiscation of pay for breach of duty.

And under the same head the purchaser of stock of a national bank must be deemed to buy his stock with whatever burden of executive control Congress has imposed upon it as a condition to its issuance.

It has never been suggested by the courts that the punishment of citizens for violation of a general statute was a function of government which required that summary power to punish be given to executive officers and that the citizens be deprived of the usual protection of judicial procedure. It is not necessary here to attempt to review the familiar and fundamental objections to punishment by summary executive process. So extraordinary a claim as that the public welfare requires this rather than judicial trial at least calls for a reference to some definite and certain authority. Giving due weight to the principle that a congressional act should be presumed to be con-

stitutional, it is submitted that the burden here rests on the Government to refer to some sufficient precedent in support of the argument against judicial trial and in favor of summary executive punishment. A study of the brief of the Attorney General discloses no case which sustains the power of Congress to authorize an executive officer to punish a citizen for breach of a general law.

It is not apparent that questions of convenience or inconvenience can have much bearing on the constitutional questions now discussed, but even if it were permissible to consider this question of convenience, it is submitted that the learned Attorney-General is in error in arguing as he does (on pp. 37 & 38) on this subject.

It is there claimed that under Sec. 9 the same question must be determined as that which arose with respect to the admission or deportation of the alien and that if judicial process were had under Sec. 9 it would be necessary to detain the alien, thus entailing a certain economic waste and certain injustice to the alien.

A question arising under Sec. 9 is not the same as that which arises on the application of the alien himself to enter. The question under Sec. 9 is as to his physical condition at the time of embarkation, while the question which was passed on under Sec. 2 of the Immigration Act by the alien's application to enter was as to his physical condition at the time of arrival in this country. If, on arrival, the immigrant is found suffering with a certain disease he must be deported without any regard as to what the past history of that disease has been.

If a judicial trial were had against the shipowner under Sec. 9, the Government would call

the medical officer who examined the alien on arrival, and this officer would testify that he had examined the alien and found his disease advanced to such a stage that it must have been detected had there been a competent medical examination at the port of embarkation. If the steamship company could not meet this testimony by proofs obtained at the port of embarkation showing that the alien had, in fact, been examined there and was not then suffering from the disease, the Government would have made out a *prima facie* case.

Neither the presence, nor the testimony, of the alien himself would be necessary. His physical condition at the time of trial would have nothing to do with the issues. His testimony would, in fact, be of little value as evidence of his physical condition at the time of embarkation, and, if his disease had a history extending to a time before his embarkation, he could not have embarked without making a false statement which would discredit his testimony on that subject in any subsequent proceedings.

It is a mistake to refer (p. 38, Government brief) to the number of cases which have arisen under Sec. 9 as 2,000 in a year, for it appears by a statement of the Commissioner General, which was offered by the Government, that during the four years preceding the trial there were only 1,125 cases where fines were imposed under Sec. 9 in all of the ports of the United States, or something less than 300 a year.

POINT IV OF GOVERNMENT BRIEF.

To the effect that Section 9 does not violate due process of law clause of the Fifth Amendment.

In this point the Attorney-General claims that Section 9 does not violate the Fifth Amendment of the Constitution in that it fails to provide for a judicial determination of guilt, and in support of his contention cites nine additional cases decided by this Court.

It will be found on examination that all of these cases arose under State laws. In all of them it was claimed that the Fourteenth Amendment imposed on State legislatures the same limitations which were imposed on Congress by the Federal Constitution, and in all nine of the cases this Court held that the Fourteenth Amendment did not have that effect in limiting the powers of State legislatures.

All of these cases were held by this Court to be beyond the reach of the Federal Constitution and it is not apparent that they can throw any light on this case. For here, the Fifth Amendment unquestionably does apply to this act of Congress if it takes the property of the plaintiffs in error without due process of law.

POINT V OF GOVERNMENT BRIEF.

To the effect that, in the cases before Circular 58 the determination of the Secretary of Commerce and Labor, that the facts warranted the imposition of a penalty was arrived at with due process of law.

If the fines before Circular 58 were imposed without notice to the plaintiffs in error and without an opportunity to be heard, then it follows that there was not due process of law, for the decisions of this Court on this subject have been so clear as to leave no room for argument.

The question of whether there was or was not notice and an opportunity to be heard is a question of fact, and, as shown in the statement of facts, that question has been disposed of by the findings.

POINT VI OF THE GOVERNMENT BRIEF.

To the effect that in all cases after Circular 58 the determination of the Secretary of Commerce and Labor that the facts warranted the imposition of a penalty was arrived at with due process of law; the regulations provided for fourteen days notice.

It has been held in a recent decision of this Court, *Londoner* v. *Denver*, 210 U. S., 373-386,

that property is not taken by due process of law unless the citizen is given an opportunity to be *heard.*

Whether Circular 58 did, or did not, give an opportunity to be heard is a question of fact. That question is disposed of by the circular itself, which does not give an opportunity to be heard but only "to submit evidence" (Plaintiffs' Finding No. 18, Action No. 510, p. 36; Plaintiffs' Finding No. 5, Action No. 511, p. 22).

Whether the allowance of fourteen days within which to submit evidence, which was given by Circular 58, did, or did not, afford the plaintiffs in error a reasonable opportunity to obtain evidence from the port of embarkation, and to be heard is also a question of fact. That question is disposed of by the findings (Plaintiffs' Findings 29 and 30, Action No. 510, p. 41; Plaintiffs' Findings 15 and 16, Action No. 511, pp. 27 & 28).

As already argued, no evidence could be obtained at the port of landing, excepting the opinion of some doctor at that port. Had such an opinion been obtained and presented, the Secretary would presumably have had before him the written opinions of two physicians who differed in their conclusions. But one of these two physicians would be the regular Government medical officer, who is, by law, made the medical adviser of the Bureau of Immigration, and, it is submitted, that on such a conflict of medical opinion, the Secretary would, as a practical matter, have had no choice but to accept the opinion of the physician who had been appointed by the Government as his medical adviser.

The whole argument of the plaintiffs in error on this subject of due process of law after Cir-

cular 58 has practically been ratified by the changes of regulations made by the Secretary of Commerce and Labor since these cases arose. For, by Circular No. 131 of the Department of Commerce and Labor (under date of October 24, 1906) Circular 58 was amended and the words "If you desire *to submit evidence* to show that said fine should not be imposed" were changed to, "If you desire *a hearing* as to whether a fine should be imposed."

And, later on, the notice which had previously been given under Circular 58 was amended so as to read, "If you desire a *hearing* as to whether "a fine should be imposed in this instance, you "will be allowed *sixty days* from the date of this "notice for that purpose."

See Immigration Laws and Regulations, issued by Dept. of Commerce and Labor. Edition of February, 1907, p. 18.

Same, Edition of October 5, 1908, p. 54.

Unless the plaintiffs in error were right in their claim that it was necessary for them to produce evidence from abroad in order to meet the charge that there had been a violation of Sec. 9, there was no reason why the Department of Commerce and Labor should have extended the period in question from fourteen to sixty days; for an opinion of a doctor in New York could easily have been otbained and presented within the period of fourteen days.

POINT VII OF THE GOVERNMENT BRIEF.

To the effect that the plaintiffs cannot complain that they did not have sufficient opportunities for defense since they failed to avail themselves of the opportunities that were afforded them or to ask for further or different opportunities.

There were two reasons why the plaintiffs in error did not attempt to submit any evidence to the Secretary of Commerce and Labor:

First.—They could not, within the period allowed, obtain any evidence, excepting the opinion of a New York doctor in opposition to the opinion of the Government doctor. The filing of such an opposing opinion would have been a vain thing for reasons already stated.

Second.—The plaintiffs in error have, throughout this controversy, claimed, and now claim, that Congress could not authorize an executive officer to impose a fine upon them in punishment for the breach of a general statute. They therefore considered that the Secretary was without jurisdiction and were unwilling to take any step which might impair their right to seek redress in courts.

It would seem to be implied, if not argued, by the Attorney General, that the plaintiffs cannot complain of the time they were allowed under Circular 58 because they might have applied for, and obtained, an extension of time.

If Circular 58 was not inconsistent with law, then under Sec. 22 of the Immigration Act of 1903 it had the force of law, and this is claimed for it by the Attorney General (p. 69 of his brief).

It follows from this that the limitation of time within which "to submit evidence" was a part of that law, and that a Government official could not change that limitation without violating the law.

The constitutionality of a statute must be determined by the provisions of the statute and not by speculating as to what a public officer will do if he violates those provisions. If it were proper to indulge in such speculations it is difficult to see how any statute could be unconstitutional if it were proper to anticipate that the officer charged with the execution of the statute would not follow it but would follow some other constitutional method of his own devising. It is submitted that the determination of a serious constitutional question cannot rest on so unstable a basis as the possibility that some public officer will by favor do what he is not required to do, or will abstain from doing what the law does require (*Security Trust Co.* v. *Lexington*, 203 U. S., 323, 333; *Roller* v. *Holly*, 176 U. S., 398, 409).

As this Court said in the latter case,

> "The right of a citizen to due process of law must rest upon a basis more substantial than favor or discretion."

POINT VIII GOVERNMENT BRIEF.

To the effect that it was within the authority of the Secretary to issue Circular 58.

The plaintiffs in error do not dispute the authority of the Secretary to issue Circular 58, in so far as certain of its provisions are concerned. They do, however, claim that it is inconsistent with law, and therefore invalid, in that provision which compels payment *before* a fine has been imposed, while Sec. 9, which must be strictly construed, does not permit the exaction of any sum until *after* a fine has been imposed.

POINT IX OF THE GOVERNMENT BRIEF.

To the effect that Congress had the power to make the payment of the penalty a condition of obtaining clearance.

The powers of Congress with respect to clearance do not present any question in this case.

The plaintiffs in error claim that these fines were imposed in violation of the Constitution, and if that claim is sustained it makes little difference what method was selected to enforce payment,

whether by execution or by withholding clearance, or by any other use of power.

Respectfully submitted,

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